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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. 74-1393

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,

and

MICHAEL FREIMAN, M.D.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

The petitioner, Thomas E. Singleton, respectfully submits to this Court, pursuant to Supreme Court Rule 24(5), this supplemental brief in support of the proposition that the Supreme Court should grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this matter.

The decision below conflicts with the decision of another court of appeals as to the authority of the Court of Appeals for the Eighth Circuit to determine the Missouri State statute herein involved to be unconstitutional absent a determination on the merits of that issue by a three-judge district court.

On April 28, 1975, the United States Court of Appeals for the Sixth Circuit handed down its opinion in *Roe, et al.* v. *Ferguson,* Sixth Circuit Number 74-2195. The attorneys for the petitioner were not able to study *Roe* v. *Ferguson* before the petition for writ of certiorari was sent to the printer for ultimate distribution to the Supreme Court and opposing counsel. The petitioner respectfully submits that the Court should consider *Roe* v. *Ferguson* and grant the writ because there is a direct conflict between the decision of the Sixth Circuit and the opinion below.

In its opinion below, the Eighth Circuit determined that it had jurisdiction to hold Section 208.152(12), RSMo Supp. 1973, unconstitutional even though the three-judge district court had not passed upon the constitutionality of that statute. The pertinent portions of the Eighth Circuit's opinion, which are printed on pages 26 and 27 of the petition for writ of certiorari, are set forth completely below:

> "III. THIS COURT'S JURISDICTION TO REACH THE MERITS
>
> We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy.

Of course, the three-judge court has not determined the merits. This court is not generally a court of original jurisdiction. Even so, there is authority for the proposition that when a case is properly before a Court of Appeals, the court has the power "to do what plainly ought to be done." *Mercury Motor Express, Inc.* v. *Brinke,* 475 F.2d 1086, 1091 (5th Cir. 1973), *citing* 9 Moore's Federal Practice § 110.25[1] (2d ed. 1972).

In reaching the merits of a case which was before the court pursuant to an interlocutory appeal under 28 U.S.C. § 1292(b) this court said:

> We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, at 213, 55 S. Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for "refinement or clarification of the issues." *United States* v. *Petrillo,* 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed. 1877; *United States* v. *Fabro, Inc.,* M.D. Ga., 206 F. Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis,* 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762.

Board of Managers of Ark. Tr. Sch. for Boys v. *George,* 377 F.2d 228, 231 (8th Cir. 1967). In addition, Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, where the point to be decided is clear. *Levin* v. *Mississippi River Fuel Corporation,* 386 U.S. 162, 170 (1967), 87 S. Ct. 927, 932.

It might be argued that the above authority, though persuasive, should not apply in the instance of an appeal to the Court of Appeals from a statutory three-judge court.

The Supreme Court has made it clear that the three-judge court mandate must be construed quite narrowly. "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez, supra* 43 Law Week 4027.

For this court to get to the heart of the matter and dispose of this case on the merits will not conflict with the policy behind the statute. Indeed, we think this case is particularly proper for disposition in this court since "[w]hile § 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we [the Supreme Court] have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent * * *." *Gonzalez, supra* at 4027, footnote 14, *citing Bailey* v. *Patterson,* 369 U.S. 31 (1962).

> The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge. *See generally Roe* v. *Norton,* 380 F. Supp. 726, 728 (D. Conn. 1974). Accordingly, we choose to make final determination of this case."

The Sixth Circuit considered the same problem but reached a wholly different result. After determining that an Ohio statute, similar to the Missouri statute herein in question, restricting the payment of Medicaid funds to those abortions necessary to preserve the mental or physical health of the pregnant woman, was not in conflict with the

pertinent federal statutory provisions of the Social Security Act, the Sixth Circuit considered whether it had jurisdiction to reach the constitutionality of that Ohio statute absent a finding on that issue by a three-judge district court. The Sixth Circuit stated as follows:

> "We turn to plaintiffs' contention that the Ohio state policy is constitutionally impermissible. Since plaintiffs' contentions were presented to the court below and appear in the record, it is argued that we should consider the constitutional issues even though the district court pretermitted them. It is generally true that an appellate court may consider grounds other than those relied upon by the district court. *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435 (1924); *Dandridge* v. *Williams,* 397 U.S. 471, 475 n. 6 (1970). Yet, this procedure is necessarily inapplicable in a case in which a three-judge court is required under 28 U.S.C. Section 2281 because an injunction is sought to restrain the enforcement of a state statute on grounds of its unconstitutionality.
>
> We are unable to agree that this case falls within the exception to the application of Section 2281 which has been carved out by the courts in situations in which the constitutional issue has been clearly settled or resolved. This exception to the three-judge court requirement was expressed in *Board of Supervisors of La. St. U. & A. & M. College* v. *Ludley,* 252 F.2d 372, 376 (5th Cir. 1958), *cert. denied,* 358 U.S. 819:
>
> > There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly put to rest by the Supreme Court contrary to the contention of the state. *Cf. Goosby* v. *Osser,* 405 U.S. 512, 518 (1973).

Although there have been a number of lower court decisions holding state statutes similar to the Ohio law unconstitutional, it cannot be said that the issue has been put to rest by the Supreme Court. In *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 40 U.S. 179 (1973), the Supreme Court condemned state action infringing the right to have an abortion. In those cases the Supreme Court did not consider the question of payment of expenses for abortion whether nontherapeutic or otherwise. *We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in* **Wulff** *v.* **Singleton,** *508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court.*

Plaintiffs further argue that we should reach the issues in this case since '(t)he policy behind the three-judge court will be adequately implemented if the court of appeals entertains the constitutional claims.' Suffice it to say that it is not the proper function of this Court to second guess Congress as to the appropriate occasion for requiring a three-judge district court.

Neither does this case come within the exception to the three-judge court requirement which arises when erroneous administrative action taken pursuant to an otherwise constitutional statute is challenged. See *Phillips* v. *United States,* 312 U.S. 246 (1974). It is unquestioned that what originally was an informal policy of the state auditor is now compelled by a state statute.

Our refusal to consider the merits of the constitutional issue presented for review does not mean that the claim is so insubstantial as not to require the impaneling of a three-judge court. Although there is judicial authority that statutes similar to the Ohio

statute are violative of the equal protection clause of the federal Constitution, the issue of substantiality is one to be determined in the first instance by the district judge in whose court the complaint is filed. In the present case, the district judge has already determined that the constitutional claim is not frivolous or insubstantial. We are of the opinion, therefore, that the action must be remanded to the district court for the convening of a three-judge district court." (Emphasis added).

For the convenience of the court, petitioner is attaching the opinion of the Sixth Circuit in *Roe et al.* v. *Ferguson,* as Appendix I to this Supplemental Brief.

There is a direct conflict between the Sixth Circuit and the Eighth Circuit as to the jurisdiction of the United States Court of Appeals to reach the merits on the respondent's constitutional claim in the absence of a determination thereon, pursuant to 28 U.S.C. Section 2281, by a three-judge district court. For that reason, and because the United States Supreme Court has not as of yet ruled that a state must make Medicaid payments for non-therapeutic abortions, this Court should grant certiorari and require that the Eighth Circuit remand this case for determination by a three-judge district court.

Respectfully submitted,

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APPENDIX I

No. 74-2195

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RACHEL ROE, ET AL., *Plaintiffs-Appellees,* v. JOSEPH T. FERGUSON, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed April 28, 1975.

Before: PECK and MILLER, Circuit Judges, and HERMANSDORFER,* District Judge.

MILLER, Circuit Judge. The district court held the Ohio statutory provision (Ohio Rev. Code, Sec. 5101.55(c)) and administrative rulings thereunder, prohibiting the use of state or local funds to pay for an abortion unless the abortion was necessary to preserve the life or physical or mental health of the pregnant woman, to be in conflict with the federal Social Security Act. 42 U.S.C. § 1396a. Enforcement of the Ohio statute and administrative policy was accordingly enjoined by the court's judgment entered September 16, 1974.[1]

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* Honorable H. David Hermansdorfer, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

[1] It has been recognized that "the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene" a three-judge court in an action to enjoin enforcement of a state statute. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 80 (1960). However, the practice of a single judge resolving the

Previously, on February 14, 1973 in *Doe* v. *Brown*,[2] the district court for the Southern District of Ohio, had nullified on constitutional grounds the Ohio criminal law proscribing the performance of certain abortions. Nevertheless, on February 21, 1974, defendant Ferguson, Auditor of the State of Ohio, wrote the Director of the Ohio Department of Welfare, announcing the policy that the auditor would not sign warrants for any vouchers arising from the Ohio Medicaid program from physicians seeking reimbursement for "any Elective Abortion bills."[3] Subsequently, the state statute prohibiting the use of state or local public funds to pay for abortions not "necessary to preserve the life or physical or mental health" of the pregnant woman, became law on June 17, 1974.[4] This law was to have taken effect on September 16, 1974, but was declared void by the district court in the present case.

The plaintiffs challenging Ohio's policy and statute, may be classified in four groups: pregnant welfare recipients, physicians who perform abortions for welfare recipients, clinics in which physicians perform such abortions, and the

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statutory claim and thus possibly obviating the need for a three-judge court to consider the constitutional claim has been expressly approved by the Supreme Court as in compliance with 28 U.S.C. § 2281. *Hagans* v. *Lavine*, 415 U.S. 528, 543-45 (1974). The Supreme Court has gone so far as to vacate the judgment of the three-judge court in *Doe* v. *Wetsby*, 383 F.Supp. 1143 (D. South Dakota 1974), which held a statute similar to that of Ohio violative of the equal protection clause, without considering a statutory ground, and remand the case for further consideration in light of *Hagans* v. *Lavine*, *supra*. 43 U.S.L.W. 3499 (March 17, 1974). In any event, even under the law as it stood before *Hagans*, it would be permissible to appeal to the court of appeals from the final order of a single district judge, basing his decision solely on statutory grounds, in a case in which a state statute was attacked on the grounds that it was both unconstitutional and in conflict with a federal statute. *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 52-53 (1922). This court thus has jurisdiction to hear this appeal.

[2] *See Doe* v. *Brown*, (Civil No. 73-46) (S.D. Ohio 1973).

[3] This policy was reaffirmed by a second letter sent on May 30, 1974, stating that certain classes of vouchers relating to elective abortions would not be paid under any circumstances while other classes of vouchers would be returned to the Department requesting a signed statement from the physician indicating the reason for the abortion procedure.

[4] Ohio Rev. Code Sec. 5101.55(c).

National Organization of Women. (NOW). In this action plaintiffs challenged the auditor's policy and the state statute as being inconsistent with the Social Security Act, Title XIX, 42 U.S.C. § 1396 *et seq.*, and also as being violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The district court on September 16, 1974 sustained the motion of plaintiffs for summary judgment, finding that there was no disputed issue of material fact and that the state statute and policy were not as a matter of law in conformity with the mandatory provisions of the federal Social Security Act, 42 U.S.C. §§ 1396 *et seq.* By thus construing the federal statute as prohibiting states participating in the Medicaid program from distinguishing expenses for elective abortions from all other medical expenses, the court avoided the constitutional questions raised by plaintiffs.

Three issues are presented on appeal: (1) Whether the policy of the Ohio state auditor and Ohio Rev. Code, § 5101.55 (c), by restricting the payment of Medicaid funds to abortions necessary to preserve the mental or physical health of the pregnant woman, are in conflict with the provisions of the Social Security Act; (2) Whether the Ohio statute and policy violate the 9th and 14th amendments, thus providing an alternative ground for affirmance; and (3) Whether this Court has jurisdiction to consider the constitutional issues presented.

Although not raised by the parties, we first consider a preliminary issue of standing.[5] It may be judicially noticed that the outcome of this case can be of no immediate concern to the pregnant welfare recipients named as plaintiffs. However, at the date of the filing of the case there can be no dispute that these plaintiffs, as pregnant indigent women, presented a justiciable case or controversy and thus

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[5] This case was not instituted as a class action and only the named plaintiffs are parties to the suit.

had standing to challenge the state statute and policy. *Roe* v. *Wade,* 410 U.S. 113, 124 (1973). The termination of plaintiffs' pregnancy cannot be considered to have rendered their case moot since the condition is capable of repetition and termination before future appellate review could be obtained. *Id.* at 125.

With regard to the standing of the plaintiff physicians, recent cases have settled the right of physicians in the practice of medicine to assert their constitutional rights to advise and perform abortions for indigent women. *Doe* v. *Bolton,* 410 U.S. 179, 187-89 (1973). *Crossen* v. *Breckenridge,* 446 F.2d 833, 839-40 (6th Cir. 1971). That plaintiff physicians in this case are not threatened with criminal prosecutions does not compel a different result. *Nyberg* v. *City of Virginia,* 495 F.2d 1342, 1344 (8th Cir. 1974); *Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1974).

In view of our ruling as to the standing of the above mentioned plaintiffs, it is unnecessary to resolve the issue of the standing of the other plaintiffs. The issues are sufficiently and adequately presented by the plaintiffs Roe and Joe and plaintiff physicians. Nothing would be gained or lost by the absence or presence of the other plaintiffs as parties. *Roe* v. *Wade,* 410 U.S. 113 at 127 (1973); *Doe* v. *Bolton,* 410 U.S. 179 at 189 (1973).

Plaintiffs first contend, and the district court held, that the state statute and the policy of the state auditor are in conflict with the provisions and purposes of the Medical Assistance Program of the Social Security Act.[6] (Medicaid). Medicaid is a federal grant-in-aid project. A state's involvement is voluntary. For a state to receive federal monies, however, its implementation of the program must meet federal requirements. Title XIX of the Social Security Act establishes a comprehensive scheme of medical care

[6] 42 U.S.C. §§ 1396 *et seq.*

for the needy to be administered by the states and jointly funded by the federal and state governments. The Ohio statutes implementing the program extend medical assistance to all recipients of Aid to Families with Dependent Children (AFDC),[7] and other programs subsumed under Ohio Rev. Code § 5101.51 and Ohio Rev. Code, Chapter 5107.

For welfare recipients covered by the statutory scheme, Title XIX provides that states must provide the following minimal services: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and x-ray services; (4) skilled nursing facility services, screening and diagnosis of children, and family planning services; and (5) physicians' services. 42 U.S.C. §§ 1396a(a)(13), 1936(a)(1)-(5).[8]

Plaintiffs argue that the abortion services excluded from coverage by the state of Ohio may properly fall within the definition of either physicians' services, inhospital services, outpatient services, or family planning services.

A number of courts have confronted the question whether a state's exclusion of Medicaid funds for abortions not required for the physical or mental health of the pregnant women can be overturned on purely statutory grounds. In *Roe* v. *Norton,* 380 F.Supp. 726 (D. Conn. 1974), it was argued that the federal statute should be construed to prohibit federal reimbursement for the expenses of an abortion unless the abortion is to prevent a detriment to the woman's physical or psychiatric health. The court there

[7] 42 U.S.C. §§ 601 *et seq.*

[8] A state may increase its Medicaid coverage to individuals in addition to the basic four categories of needy persons set forth in the Social Security Act. The services required to be supplied to these additional individuals are either the services falling under the five basic classifications or, alternatively, those services falling under any seven classifications of a longer list. *See* 42 U.S.C. §§ 1396a(10)(B), 1396a(13)(C), 1396(a)(1)-(17). There is no indication in this case, however, that Ohio has chosen any alternative classifications of services to provide certain needy individuals or that the plaintiffs in the case do not fall within the basic four categories of needy persons.

held that the language in the federal statute authorizing the reimbursement for "necessary medical services"[9] does not permit the exclusion of any abortions and that the state statutory restriction was therefore invalid. While the court based its holding on statutory grounds, it is evident that this approach was resorted to to "avoid doubts as to the constitutionality" of the state statute. 380 F.Supp. at 730.[10]

Other courts faced with the same question have refused to find that such state policies are in conflict with the federal statute, preferring to base their holdings on constitutional grounds. The earliest federal court decision came from New York in 1972. *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496 (E.D. N.Y. 1972) *aff'd sub nom. Ryan* v. *Klein,* 412 U.S. 924 (1973), *but vacated and remanded in light of Roe* v. *Wade* and *Doe* v. *Bolton,* 412 U.S. 925 (1973). The *Klein* court observed that "[m]edical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance," and that abortion services are thus "provided under the Medicaid program as 'necessary' medical assistance." *Id.* at 500. The court, however, refused to rely solely on statutory grounds, basing its decision primarily on the equal protection clause.

In a more recent case, *Doe* v. *Rose,* 499 F.2d 1112 (10th Cir. 1974), the abortion policy of the State of Utah, similar to the Ohio policy, was challenged on both statutory and constitutional grounds. Addressing itself first to the statutory ground of attack, the *Rose* court noted that the federal Medicaid statute makes no mention of abortion. The Court

[9] 42 U.S.C. § 1396.

[10] In this case, unlike *Roe* v. *Norton,* supra, defendant admits that Title XIX *permits* reimbursement of state payments for abortions not medically necessary. Defendant merely argues that Title XIX does not *require* a state to pay for such procedures.

thus felt that it lacked "specific guidelines as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, *which* abortions were to be covered by Medicaid benefits." 499 F.2d at 1114. Although it recognized that preference is to be given statutory, as opposed to constitutional, resolution of welfare controversies, the court nevertheless stated that:

> in light of the applicable statutes' complete silence on the abortion question, we prefer to dispose of the present appeal on constitutional grounds, rather than by any strained effort to show that the policy in question is, in effect, though not in so many words, prohibited by [the] federal . . . statute. *Id.* at 1115.[11]

A similar policy of the State of Pennsylvania limiting Medicaid reimbursement to "medically necessary" abortions was under attack in *Doe* v. *Wohlgemuth,* 376 F.Supp. 173 (W.D. Pa. 1974), *vacated and remanded on other grounds,* 505 F.2d 186 (3rd Cir. 1974). In that case a three-judge district court reasoned that, even if it should be assumed that abortion payments are clearly authorized under Title XIX of the Social Security Act, it must nevertheless be recognized that "Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a 'scheme of cooperative federalism.'" 376 F.Supp. at 184, *quoting* from *Dept. of Social Service* v. *Dublino,* 413 U.S. 405, 413 (1973).

The court analyzed the problem to be whether Pennsylvania had the latitude to determine when the performance of an abortion became a necessary medical service. Relying on *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the *Wohlge-*

[11] The reason that a three-judge court was not convened in *Doe* v. *Rose* is that the policy under attack was an informal one not mandated by a state statute. The case thus fell within an exception to the three-judge court requirement. *See Phillips* v. *United States,* 312 U.S. 246 (1941).

muth court went on to hold that, in light of the latitude afforded states in setting the level of benefits and standards of need in welfare administration, the Pennsylvania regulation did not conflict with Title XIX of the Social Security Act.[12]

We are in accord with the decisions which have found no conflict between state restrictions of Medicaid payments to elective abortions and the provisions of the Social Security Act. There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§ 300a *et seq.* providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. § 300a-6.

In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8).

In view of this evidence of the Congressional attitude toward abortion as a family planning technique or as an acceptable medical service in general, it is difficult to construe the silence of Congress in Title XIX as an endorsement of the view that non-therapeutic abortions are included in the "necessary medical services" required to be

[12] The *Wohlgemuth* court however, went on to find the Pennsylvania statute unconstitutional on equal protection grounds.

furnished by a state participating in Medicaid. This is not to say that Congress may constitutionally exclude such abortion services from coverage in the Medicaid program. In the absence of a legislative history indicating a contrary position, however, we cannot say that the statute itself prohibits such an exclusion.

We turn to plaintiffs' contention that the Ohio state policy is constitutionally impermissible. Since plaintiffs' contentions were presented to the court below and appear in the record, it is argued that we should consider the constitutional issues even though the district court pretermitted them. It is generally true that an appellate court may consider grounds other than those relied upon by the district court. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Dandridge* v. *Williams*, 397 U.S. 471, 475, n.6 (1970). Yet, this procedure is necessarily inapplicable in a case in which a three-judge court is required under 28 U.S.C. § 2281 because an injunction is sought to restrain the enforcement of a state statute on grounds of its unconstitutionality.

We are unable to agree that this case falls within the exception to the application of § 2281 which has been carved out by the courts in situations in which the constitutional issue has been clearly settled or resolved. This exception to the three-judge court requirement was expressed in *Board of Supervisors of La. St. U. & A. & M. College* v. *Ludley*, 252 F.2d 372, 376 (5th Cir. 1958), *cert. denied* 358 U.S. 819:

> There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly put to rest by the Supreme Court contrary to the contention of the state. *Cf. Goosby* v. *Osser*, 405 U.S. 512, 518 (1973).

Although there have been a number of lower court decisions holding state statutes similar to the Ohio law unconstitutional, it cannot be said that the issue has been put to rest by the Supreme Court. In *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), the Supreme Court condemned state action infringing the right to have an abortion. In those cases the Supreme Court did not consider the question of payment of expenses for abortion whether nontherapeutic or otherwise. We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court.

Plaintiffs further argue that we should reach the constitutional issues in this case since "[t]he policy behind the three-judge court will be adequately implemented if the court of appeals entertains the constitutional claims." Suffice it to say that it is not the proper function of this Court to second guess Congress as to the appropriate occasion for requiring a three-judge district court.

Neither does this case come within the exception to the three-judge court requirement which arises when erroneous administrative action taken pursuant to an otherwise constitutional statute is challenged. *See Phillips* v. *United States,* 312 U.S. 246 (1974). It is unquestioned that what originally was an informal policy of the state auditor is now compelled by a state statute.

Our refusal to consider the merits of the constitutional issue presented for review does not mean that the claim is so insubstantial as not to require the impaneling of a three-judge court. Although there is judicial authority that statutes similar to the Ohio statute are violative of the

equal protection clause[13] of the federal Constitution, the issue of substantiality is one to be determined in the first instance by the district judge in whose court the complaint is filed. In the present case, the district judge has already determined that the constitutional claim is not frivolous or insubstantial. We are of the opinion, therefore, that the action must be remanded to the district court for the convening of a three-judge district court.

The judgment of the district court is therefore reversed and the action is remanded with directions that the district judge request the Chief Judge of the Circuit to impanel a three-judge court to hear and determine the constitutional issues presented.

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[13] *See Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1974); *Doe* v. *Rose,* 499 F.2d 1112 (10th Cir. 1974); *Coe* v. *Westby,* 383 F.Supp. 1143 (D. South Dakota, 1974), *judgment vacated and case remanded* 43 U.S.L.W. 3499 (March 17, 1974); *Doe* v. *Wohlgemuth,* 376 F.Supp. 173 (W.D. Pa. 1974), *vacated and remanded on other grounds,* 505 F.2d 186 (3d Cir. 1974); *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496 (E.D. N.Y. 1972), *aff'd sub nom. Ryan* v. *Klein,* 412 U.S. 924 (1973), *but vacated and remanded in light of Roe* v. *Wade* and *Doe* v. *Bolton,* 412 U.S. 925 (1973).